Supreme Court, U.S.
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No. 00-1029

IN THE

Supreme Court of the United States

LESLIE K. BRAUN,

Petitioner,

v.

JEFFREY D. HEADLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MARYLAND COURT OF SPECIAL APPEALS

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent generally adopts Petitioner's statement, and makes only the following supplements and/or points.

Petitioner failed to include in the second paragraph on page five (5) that except for a indecipherable telephone message, she provided Respondent no notice of her removing the child from Maryland to Arizona. That message stated that Respondent would not be seeing the child for his court-ordered visitation, and that he would hear from her lawyer. Petitioner also failed to indicate that she provided no records at trial to verify any of her alleged illnesses, or to verify that the minor child ever suffered from pneumonia. Finally Petitioner failed to state that it was approximately one-and-one half (1.5) months from the time that she left Maryland until Respondent actually knew the physical location of his child.

REASONS FOR DENYING THE WRIT

The question presented by the petition for *certiorari* in this case should not be reviewed by the Court. The majority of state courts have applied standards congruous with that of Maryland. Additionally, the public policy effects of Petitioner's position would be detrimental to the health, welfare and safety of children.

I.

THE MAJORITY OF STATES HAVE RULED THAT A CUSTODIAL PARENT'S CONSTITUTIONAL RIGHT TO RELOCATE WITH A MINOR CHILD MUST BE QUALIFIED AGAINST THE STATE'S COMPELLING GOVERNMENTAL INTEREST OF PROTECTING THE WELFARE OF MINOR CHILDREN

An individual's right to travel is a fundamental right which is firmly ensconced in the jurisprudence of this Court. However, the majority of states have held that a relocating custodial parent's right to travel must be qualified by the best interests of the minor child. Pet. at 11. The core issue is whether the relocation or upcoming relocation of a custodial parent is a material change in circumstances which warrants a modification of child custody. In the instant case, the trial judge ruled that the relocation of Petitioner with the minor child was itself a change of circumstances which warranted a review of the custody arrangement. See Pet. App. at 37a. This ruling resulted in the trial judge modifying custody, and granting custody of the minor child to the Respondent. See Pet. at 10-11. The ruling was affirmed by the Maryland Court of Special Appeals, and the Maryland Court of Appeals, which denied certiorari. *Id.* The Maryland Court of Special Appeals ruled that while balancing the right to travel and the state's compelling interest in protecting the child, the child's best interests must be considered. *Id.* The court held that the "best interests" of the child could be determined by equally considering the custodial parent's right to travel, the benefit for the child of remaining with the custodial parent, and the benefit of the non-custodial parent's right to maintain a close association and frequent contact with the child.

Pet. App. at 27a-29a. Within the facts of this case, the court found no need to change the standard for modification of custody or to reverse the trial court's ruling. *Id.*

Petitioner suggests that the courts of Maryland erred by allowing Petitioner's move to Arizona to stand as the "per se" cause to allow a review of the custody situation. Pet. at 12. While admitting that the majority of states have adopted a standard like Maryland's, Petitioner argues that these standards violate the right to travel of all relocating custodial parents. Pet. at 21.

In *LaChapelle v. Mitten,* 607 N.W.2d 151 (Minn. Ct. App. 200), the Court of Appeals of Minnesota held that the trial court was justified in using a "best interests" standard to require that the custodial mother's continued custody of her child be conditioned on her return to Minnesota (where the child was born and had lived for four (4) years) from Michigan. *Id.* In a case of first impression, the Court held that requiring the mother to relocate back to Minnesota was not a violation of her constitutional right to travel because ". . . the trial court did not restrict [mother's] right to remain in Michigan, the court only required [the child] to be returned to Minnesota. Any burden on [mother's] right to travel arises from her desire to remain [the child's] sole physical custodian". *Id.* at 164. That reasoning is precisely on point with that of the trial judge in the instant case. In reciting his opinion, Judge Whitfill specifically stated that he did not have the power to order Petitioner to remain in Maryland, but did have the authority to order the child to remain in Maryland. Pet. App. at 46a. Judge Whitfill also stated that Petitioner could move anywhere that she wished to, and that she could be as far or as close to the minor child as she chose. *Id.*

In *In re Custody of D.M.G. and T.J.C.*, 951 P.2d 1377 (Mont. 1998), the Supreme Court of Montana reversed a lower court ruling that a custodial mother who had moved from Montana to Oregon had to relocate back to Montana in order to retain custody of her children. While recognizing that the state's interest in protecting children was compelling, the Court recognized the right to travel as a fundamental one. *Id.* at 1381. The Court stated that the best interests of a child were compelling enough to interfere with the right to travel, but that the interference must be done with caution and justification. *Id.* at 1383 (quoting *In re Marriage of Cole*, 729 P.2d 1276, 1280-81 (Mont. 1986)). The Court then concluded that in cases of a relocation, it would require that the parent requesting the restriction on travel to provide sufficient proof that a restriction is in the best interests of the minor child. *Id.* The standard established in *D.M.G.* gives more deference to the relocating parent then that of the instant case. However, under the *D.M.G.* standard, Respondent still prevails. In *D.M.G.*, mother left Montana for Oregon because of "personal conflict between the parties and because of the availability of better job opportunities and the nearness of family". *Id.* at 123. Mother also notified father at least one (1) month prior to leaving, that she intended to move to Oregon. *Id.* Conversely, in the case at hand, Petitioner left Maryland with no notice to Respondent and as the trial judge found, Petitioner's "reason to move to Arizona . . . was to separate the child from the father". Pet. App at 37a. Under the *D.M.G.* test, the facts of the present case still satisfy the court's requirement of proving that a travel restriction was in the best interest of the minor child.

In *Jaramillo v. Jaramillo*, 823 P.2d 299 (N.M. 1991), addressed by Petitioner at Pet. 13-14, the Court determined

that each party's burden in a relocation case was to demonstrate how the best interests of the child must be served. *Id.* at 308. The Court also stated in Footnote 9, "We do not hold that a proposed relocation constitutes a substantial and material change in circumstances as a matter of law, but it is difficult to imagine an instance in which a proposed relocation will not render an existing parenting plan or custody-and-visitation arrangement unworkable". *Id.* Footnote nine (9) indicates that regardless of the standard used to modify custody, the common sense nature of the "best interests" of the child rationale must be seriously considered in balancing the right to travel and the protection of children.

In *Tomakso v. Dubuc*[1], 761 A.2d 407 (N.H. 2000), the Supreme Court of New Hampshire applied the relocation standard that the Supreme Court of Connecticut adopted in *Ireland v. Ireland*, 717 A.2d 676 (Conn. 1998). In *Tamasko*, the custodial parent had agreed in her divorce decree not to move from New Hampshire without court approval. *Id.* at 408. The parent then attempted to move her children to another state, and as such, she filed for a modification of custody. In applying the *Ireland* standard, the Court determined that the custodial parent who is seeking permission to relocate bears the burden of demonstrating by a preponderance of the evidence that (1) the relocation is for a legitimate purpose, and (2) the proposed location is reasonable in light of that purpose. *Id.* at 409. The Court then noted that once the relocating party has satisfied their burden, then it becomes the non-custodial parent's burden to demonstrate by a preponderance of the evidence that the relocation would not be on the best interests of the child. *Id.* Petitioner's actions in removing the child from Maryland with no notice to Respondent, presenting no legitimate reason for

1. This case was not cited by Petitioner.

relocating and refusing to allow Respondent to know her whereabouts for one and one-half (1.5) months, conclusively fails to satisfy the *Ireland* standard.

Each referenced state court has recognized the fundamental right to travel that is protected by the Constitution. Each has also recognized that the state's right to protect minor children is a compelling governmental interest. A review of the standards regarding relocation in each case reflects that each court has made its best attempt to reconcile the right to travel and the right to protect children. In the case at hand, the courts determined that the child's best interests were paramount, and that ordering the child to remain in the state of Maryland did not violate Petitioner's right to travel. Pet. App. at 27a-29a. It is apparent that the majority of states have determined that the right to travel must be measured against the right of a state to protect its minor children. As this Honorable Court indicated in *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984), "The judgment of a state court determining on review a child custody decision is not ordinarily a likely candidate for review by this court". In the instant case, the majority must stand and be permitted to utilize the proper standard to balance the protection of children and the right to travel.

The Petitioner suggests that the Court adopt the standard used in *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999).[2] Pet at 16. In *Watt*, the parties' divorce decree contained a provision that in the event that custodial mother moved more then fifty (50) miles away from Upton, Wyoming, then custody of the minor

2. Petitioner candidly admits that the *Watt* case is the only state appellate case in which a court has held that considering the relocation of a custodial parent as a change in circumstances is violative of the right to travel. Pet. at 16.

children was automatically changed to father. *Id.* at 610. The trial court did not honor the provision, however, the court modified custody to father, solely based on mother's relocation from Upton, Wyoming to Laramie, Wyoming. *Id.* at 612. The Supreme Court of Wyoming reversed, holding that the relocation of the mother to Laramie was not a sufficient change in circumstances to warrant a modification of custody. *Id.* at 616. The Court further stated that the right of a relocating parent to move was not to be denied "unless clear evidence before the court demonstrates another substantial and material change of circumstance and establishes the detrimental effect of the move upon the children". *Id.*

While the *Watt* standard does provide more protection for the relocation, it is nonetheless a "best interests" of the child standard. In the instant case, where a custodial mother moved a child across the country with no prior notice to the father and in an attempt to alienate the child from her father, the *Watt* standard would have provided Petitioner no better protection then any of the other state standards above. With the realization that the "best interests of the child" concept prevails in each state, regardless of the standard for modification, it would be a waste of judicial economy to attempt to change the specific standards by which each state protects its' children in a relocation situation.

II.

THE PUBLIC POLICY RESULTS IN THIS MATTER WOULD BE CATASTROPHIC TO THE MINOR CHILDREN OF MARYLAND AND OF THIS COUNTRY

Perhaps more important than the standard itself would be the public policy implications of allowing Petitioner to succeed in this matter. It is undisputed that when Petitioner chose to leave Maryland for Arizona with the minor child, a court order existed granting Respondent visitation on every other weekend and holidays. It is also undisputed that Respondent exercised his visitation regularly, and was a part of the child's life. For this Honorable Court to grant Petitioner's request would be to send a signal to parents around the country that it is proper to remove a child from any state with no notice to the non-custodial parent. Granting Petitioner's request would also significantly undermine the power and reach of the state courts. It would also reduce the courts' power to issue holdings of contempt for failing to follow its orders. It would send a message to parents considering relocation with a minor child that it is reasonable to relocate even if it is violation of a court's order. This in turn would result in a "flood" of litigation in the courts of this nation, due to the non-custodial parents filing for the return of their children, and for contempt of court proceedings.

The right to travel is a fundamental right, however, it should not prevail over the state's rights to protect its children. That which Petitioner characterized as the state's "paternalistic responsibilities" is truly the ever important right for each state to safeguard the best interests of its'

children. More specifically, if this Honorable Court is inclined to consider creating a standard for balancing of these two (2) concepts, the facts of the instant case will result in public policy that is not acceptable to our jurisprudence and our nation.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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